

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 26, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2014AP1901-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2014CM303

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ASHLEY L. EIRICH,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County:
JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ The State of Wisconsin appeals from an order suppressing drug evidence found during the search of the billfold compartment of

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Ashley L. Eirich's wallet. The circuit court granted the suppression motion on grounds that the arresting officer's probable cause to search the vehicle based on the odor of raw marijuana did not extend to a search of the bill compartment of Eirich's wallet where the officer found Suboxone strips. We affirm.

Facts

¶2 Around 12:30 a.m. on March 14, 2014, a Plymouth police officer with seven years of training and experience, including narcotics training, stopped Eirich's vehicle for a broken taillight. The officer identified the driver as Eirich and asked for the passenger's identification as well. While speaking with the passenger, the officer noticed an "odor of raw marijuana" coming from the vehicle. When the officer returned to his vehicle to check Eirich's license, he radioed for backup for safety purposes so that he could conduct a search of Eirich's vehicle.

¶3 When backup arrived, the officer told Eirich and the passenger to step out of the vehicle so he could search it. They complied. Eirich attempted to keep her purse with her as she exited the vehicle, but the officer told her to leave it in the vehicle so that he could search it.

¶4 The first thing the officer searched was Eirich's purse. The officer testified that he believed "there could be marijuana located in [Eirich's] purse" because he smelled raw marijuana. He did not smell any odor of marijuana coming from the purse, however.

¶5 The officer found no marijuana in Eirich's purse, but he did find her wallet, and he searched that too. He searched the various compartments of the wallet thoroughly, and behind the credit card slots, in a compartment "just large

enough to fit a ... dollar bill” he found some receipts and a cellophane wrapper. He removed the cellophane wrapper from the wallet and saw a strip inside of it. He pulled the strip out of the wrapper and later confirmed that it was a Suboxone pill in the form of a cellophane strip.

¶6 Based on the Suboxone strip, the officer detained Eirich, and then he completed the search. No marijuana was found in the vehicle, though the passenger apparently admitted to smoking marijuana in the vehicle earlier that day. Eirich was charged with misdemeanor possession of a controlled substance in violation of WIS. STAT. § 961.41(3g)(b).

¶7 Eirich moved to dismiss on grounds that there was no factual basis for finding that Eirich “knowingly” possessed the Suboxone, but the circuit court concluded that the presence of the Suboxone in the purse was sufficient evidence to support the charge. Eirich also moved to suppress the evidence, challenging the warrantless search of the vehicle and, in particular, the search of the purse. The circuit court granted the motion to suppress, reasoning that although the odor of raw marijuana created probable cause for searching the vehicle and even the purse, “I don’t think it was probable that the raw marijuana [the officer was] searching for was in the bill portion of the wallet behind the credit cards and receipts.” The drug evidence was suppressed, and the State appeals.²

² The State may appeal from the grant of a motion for suppression. WIS. STAT. § 974.05(1)(d).

Discussion

¶8 There is no dispute that the stop of Eirich’s vehicle was lawful and that the odor of raw marijuana created probable cause to search the vehicle. The question is whether the scope of the probable cause to search extended to the bill compartment inside of Eirich’s wallet where the Suboxone was found. Whether probable cause to search existed is a question of constitutional fact. On review, the appellate court defers to the circuit court’s findings of historical fact unless they are clearly erroneous but independently determines how the constitutional principles apply to those historical facts. *State v. Dearborn*, 2010 WI 84, ¶13, 327 Wis. 2d 252, 786 N.W.2d 97.

¶9 The State attempts to narrow the issue to whether the officer’s opening the billfold compartment inside the wallet was lawful, citing the circuit court’s reasoning. But our standard of review of the constitutional issue is de novo, so the State’s argument about the precise reasoning of the circuit court as to why the search was unconstitutional is irrelevant. Our independent review considers whether under the totality of the circumstances there was probable cause to support the warrantless search that discovered the Suboxone strip.

¶10 “The scope of a warrantless search of an automobile ... is not defined by the nature of the container in which the contraband is secreted,” *State v. Weber*, 163 Wis. 2d 116, 139, 471 N.W.2d 187 (1991) (citation omitted), but by whether it is reasonable to believe, under the totality of the circumstances, that particular evidence would be located in the container that was searched. *State v. Tompkins*, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988); *see also United States v. Ross*, 456 U.S. 798, 824 (1982) (limiting the scope of a warrantless search of an automobile to the places in which there is probable cause to believe that the object

of the search may be found). “What is required is more than a possibility, but not a probability, that the conclusion [that the object will be found in the searched location] is more likely than not.” *Tompkins*, 144 Wis. 2d at 125.

¶11 We must apply this standard when we review the circuit court’s determination that there was insufficient likelihood that “the raw marijuana [the officer was] searching for was in the bill portion of the wallet behind the credit cards and receipts.” The State relies first and foremost on *State v. Secrist*, 224 Wis. 2d 201, 589 N.W.2d 387 (1999), where the unmistakable odor of marijuana emanating from an automobile provided probable cause to arrest the driver, who was the sole occupant of the vehicle. But the court in *Secrist* carefully distinguished between probable cause to search and to arrest, noting that probable cause to arrest depends on whether the evidence supported a belief that the person to be arrested had committed a crime, while probable cause to search depends on “whether evidence of a crime will be found” in the searched location. *Id.*, ¶13. Under the facts in *Secrist*, there was probable cause to arrest because the evidence linked a specific person—the driver—to commission of a crime. *Id.*, ¶34. The probable cause arose from the following circumstances:

[O]n a holiday afternoon, the defendant drove up to a uniformed police officer and asked him for directions in halting speech. The officer, a trained veteran of the New Berlin police department with 23 years experience, immediately smelled a strong, unmistakable odor of marijuana coming from the defendant’s vehicle. The defendant was the sole occupant of the vehicle [and] ... the odor of marijuana was coming from the area where the driver was seated....

Id., ¶35 (footnote omitted). In these circumstances, the court held, there was probable cause to arrest the defendant for a crime, and that arrest gave the officer authority to conduct a search incident to arrest. *Id.*, ¶35 & n.12.

¶12 Here, in contrast, we have two occupants of the vehicle and what is described as an “odor of raw marijuana” while speaking to the passenger. The officer did not claim that he had probable cause to arrest either occupant at that time but instead decided to search for evidence of the suspected crime. Since this was a warrantless search based on probable cause, rather than a search incident to arrest, the question is whether there was “more than a possibility, but not a probability” that the raw marijuana was more likely than not located within the bill compartment of the wallet inside the driver’s purse. *See Tompkins*, 144 Wis. 2d at 125.

¶13 The State’s argument fails to refute the commonsense inference, implicit in the circuit court’s decision, that an odor of raw marijuana strong enough to emanate from the vehicle was unlikely to be found in a wallet inside of a purse. The State cites to documented instances of law enforcement officers finding marijuana within the bill compartment of a wallet, but none of the cases the State cites concerns a warrantless automobile search based on probable cause.³ We are not holding that marijuana never could be found in the bill compartment of a wallet. We are upholding the circuit court’s determination that under the facts of this case it was not “more than a possibility” that the evidence of the crime that was the object of the search—an amount of raw marijuana sufficient to be smelled while speaking to the passenger of a vehicle—could be located in the interior

³ The cases cited in support of the state’s argument do not discuss the scope of a warrantless search under the automobile exception and, therefore, are inapplicable. *See State v. Ellenbecker*, 159 Wis. 2d 91, 95, 464 N.W.2d 427 (Ct. App. 1990) (discussing the reasonableness of a seizure); *State v. Holmes*, 522 P.2d 900, 904 (Or. Ct. App. 1974) (discussing a search incident to arrest); *Bailey v. State*, 438 S.W.2d 321, 324 (Ark. 1969) (discussing the reasonableness of a frisk); *State v. Unruh*, 133 P.3d 35, 39 (Kan. 2006) (discussing the scope of an inventory search); *United States v. Williams*, 726 F.2d 661, 664 (10th Cir. 1984) (discussing a search incident to arrest).

compartment of a closed wallet that was itself enclosed inside of the driver's purse.

¶14 The State also cites the officer's training and experience, but it does not explain what training or experience would enable an officer to smell an amount of raw marijuana small enough to fit inside of the bill compartment, even when it was hidden away inside of a wallet inside of a purse. Training and experience do not turn police officers into drug-detection canines. The State argues that the smell of raw marijuana created sufficient suspicion to justify a warrantless search of any "potential hiding places for small quantities of marijuana such as joints, leaves, 'shake,' or seeds," but offers no authority that has ever so held. We decline to extend the rule in this case.

¶15 In a different case, under different circumstances, there could be probable cause to search for a rolled marijuana joint in a wallet. For instance, if an officer detected an odor of burnt marijuana that might indicate that a recently-smoked joint had been tucked away somewhere. Or if an officer saw what appeared to be residue from a rolled joint in the car. But here, where it is undisputed that the sole fact alleged to create probable cause was the odor of raw marijuana emanating from the passenger's side of the vehicle, there was no probable cause to justify a search of the interior bill compartment of Eirich's wallet inside of her purse.

By the Court.—Order affirmed.

This opinion will not be published pursuant to WIS. STAT. RULE 809.23(1)(b)(4).

